IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.580 OF 2007

Subhash R. Acharya)
Adult, Indian Inhabitant, having his office at)
Welcome House, S.B.S. Road, Next to G.P.O.,)
Fort, Mumbai-400 001)..Petitioner

Versus

1. State of Maharashtra,)
through the Dairy Commissioner, Greater Mumbai)
Milk Scheme, Worli Seaface, Worli,)
Mumbai-400 018.)

2. M/s. Garib Nawas Corporation,)
a firm, having its office at Kohinoor Society,)
Shop No. 31, Opp. Municipal School, Link Road,)
Sakinaka, Mumbai-400 072)

3. The Dairy Commissioner, Greater Mumbai)
Milk Scheme, Worli Seaface, Worli,)
Mumbai-400 018)

4. The Secretary,)
The Government of Maharashtra,)
Agriculture, Animal Husbandary, Dairy)
Development and Fisheries Department,)
Mantralaya, Mumbai-400 032.)

5. The Chief Executive Officer,)
Aarey Milk Colony, Goregaon (East),)
Mumbai.)

6. The Hon'ble Minister for Dairy Development)
Agriculture, Animal Husbandary, having his)

office at Mantralaya, Mumbai-400 032)
Notice of Respondent Nos. 1, 3 to 6, to be)
served on Government Pleader, Original Side,)
High Court, Mumbai-400 023.).
Respondents

Mr Ravi Nakhwa, instructed by Mr. Vasant B Dhawan for the petitioner.

Mrs. Geeta Shastri, Assistant Government Pleader, for respondent Nos.1 and 3 to 5

Mr S.U Kamdar, instructed by Mr. Bipin Joshi for respondent No.2

Mr.Nitin Pradhan, instructed by Ms. Hemani Jhariya, for respondent No.6

CORAM: **SWATANTER KUMAR, C.J.** &
SMT. RANJANA DESAI, J.

Judgment reserved on : July 24, 2007
Judgment delivered on: August 16, 2007

JUDGMENT (Per Swatanter Kumar, C.J.):

Rule. Respondents waive service. By consent Rule made returnable forthwith. Heard learned counsel for the parties.

2. By this petition under Article 226 of the Constitution of India the petitioner prays for quashing of the order dated 21st August 2004

passed by the Section Officer, Government of Maharashtra, whereby the contract for recovery of entrance fee from vehicle drivers, who enter from three check nakas of Goregaon, Powai and Marol respectively in Aarey Milk Colony has been extended for a period of 3 years with effect from 17th February 2005 by increasing the contract amount by 5%. The petitioner contends that the said order is arbitrary, discriminatory, is in colourable exercise of power, denying fair competition and the same is also entirely to the disadvantage of the State, besides causing huge loss to the public exchequer. It is averred that respondent No. 6, Minister for Dairy Development Agriculture and Animal Husbandary, acted contrary to the known canons of administration. As a result of certain controversies raised and diverse stand taken by respondent No.6 and the State Government, the question in regard to the ambit and scope of the powers exercisable by the Minister in terms of Maharashtra Government Rules of Business, although ancillary, is a pertinent question which is required to be answered by the court.

3. In order to answer the above legal questions appropriately, a reference to basic facts would be necessary. According to the petitioner, respondent No.1 issued notices of inviting tenders in local

newspapers on 30th December 2001. The tender related to the management of three toll nakas (points) within Aarey Milk Complex, Goregaon (East), Mumbai. Three different check posts held under this area are Marol, Powai and Goregaon. Respondent No. 1 had evolved a scheme of engaging contractors for collecting toll from vehicles passing through these toll nakas at three different rates for different categories of vehicles. The contractor is selected on the basis of the bid/tender called for that purpose. Notice inviting tenders is annexed at Exhibit A to the petition. In terms of Government Resolution No. AMC/1001/Case No 122/PDM/8 dated 2nd December 2001 the contract was to be awarded for a period of 3 years on the pre-determined rates as approved by the Government. Respondent No.5, vide letter dated 16th February 2002, informed respondent No. 2 that his bid/tender was accepted for recovery of traffic tax at Goregaon, Marol and Powai check posts and an agreement was entered into between the parties on 16th February 2002 for a period of 3 years, which expired on 16th February 2005. Exhibit B to the petition is a copy of the said agreement executed by the parties. Certain disputes had arisen, according to the petitioner, between respondent Nos 1 and 2, which were referred to the Commissioner of Dairy Development and the same were disposed of, vide order dated

22nd March 2002. This order was challenged in this Court by filing Writ Petition No 687 of 2002 and it was disposed of by order dated 26th April 2002. The said order reads as under:

> "Heard Mr. Hegde, learned counsel for the Petitioner, Petitioner, Mr. Khatito, learned Counsel for respondent No. 2 and perused the Writ Petition, the documents annexed thereto and the Affidavit in reply filed "by Respondent No.1 as well as Respondent No. 2 and the additional Affidavits,
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> 2. Without going into the facts of the case in detail,suffice it to say that Respondent No. 2 viz, M/s. Garib Nawaz Corporation has been awarded contract for the recovery of entry fees (toll fees) in respect- of vehicles taking entry in Arey Milk Colony, Goregaon from Goregaon, Marol and Powai 'Chowk Posts. The said contract is for a period of three years. As per the said contract the Respondent No. 2 is required to pay a sum of Rs.l6.58 Crores for the contract for the period of three years and the said amount is required to be deposited by Respondent No. 2 at the rate of Rs.1,51,415/- per day on Tuesday/Friday of the week in advance at the office of Chief Executive Officer, Arey, Goregaon. It appears that Respondent No. 2 committed some defaults in respect of security deposit as well as periodical deposits. Thus, the dispute arose "between the Respondent No. 2 and Chief Executive Officer, Aarey Milk Colony viz. parties to the contract and matter was referred to the Commissioner, Dairy Development (Arbitrator). The Arbitrator in his award dated 22nd March, 2002 observed that it is necessary that amount of Rs.16.58 Crores should be paid by Respondent No. 2 herein from time to time to the Government in accordance with the terms and conditions of the period during the period of three years and if the contractor is incapable or not desirous of complying with the conditions of the contract and for the said reason the

contract is cancelled. The contract should be entrusted to other person as an alternative arrangement and if the amount receivable ,by virtue of such contract is less than the amount of the present contract then the amount of loss should be recovered from Respondent No. 2 herein viz. Garib Nawaz Corporation. The Arbitrator also directed the Respondent No. 2 herein viz. M/s. Garib Nawaz Corporation to deposit the overdue amount of entrance fee upto 21st March, 2002 which is payable to the Government to the tune of Rs. 27,63,94l/- alongwith penal interest and amount of entrance fee as per the contract as per daily rate on or before 30th March, 2002, failing which it would be assumed that they are not capable of continuing the contract and the contract will be cancelled as per condition No. 16 and 22 of the contract from midnight of 33.3.2002. The said order of Arbitrator has not been complied with by Respondent No. 2. as we are informed that Minister, Dairy Development has extended the time. We are unable to approve the order of Minister, Dairy Development in extending the time as such order cannot be said to have sanction of law. Besides that we are informed that the Chief Executive Officer has agreed for reduction of the contract amount to the extent of Rs. 5 Crores on the representation of the Respondent No. 2. To say the least such order of Chief Executive Officer is highly unjustified. In the matter off award of contract, if such action is upheld, it is bound to breed corruption and result in favouritism for extraneous consideration.

3. 'We asked the learned counsel for respondent No. 2 as to whether Respondent No.2 is desirous of continuing with the contract as per the terms and conditions of the original contract at the rate of Rs.16.58 crores for the period of three years and periodical deposit as per the contract terms, the learned counsel for Respondent No. 2 after seeking instructions submitted that the Respondent No. 2 undertakes to abide by terms and conditions of the

original contract at a contract amount of Rs.l6.58 crores for a period of three years and accordingly, shall deposit the per day amount of entry fees at the rate, of Rs.1,51,415/- in advance henceforth as per the terms of the contract.

4. In view of the submissions made by the learned counsel for the parties, we dispose of the writ petition by following order: -

(i) The reduction of the contract amount to the tune of Rs.3 Crores by Chief Executive Officer is set aside.

(ii) The Respondent No. 2 viz. M/s. Garib Nawaz Corporation is directed *to* file an undertaking before this court within three weeks from today that they would faithfully abide by the terms and conditions of the original contract entered into between Respondent No. 2 and the Chief Executive Officer, Arey Milk Colony for the recovery of entry fee (toll fee) in respect of vehicles taking entry in Arey Milk Colony, Goregaon from Goregaon, Marol and Powai Check Post.

(iii) We direct Respondent No. 2 viz. M/s. Garib Nawaz Corporation to deposit the arrears of security deposit, if any computed at the contract amount of Rs. 1.58 crores within three weeks from today.

(iv) We also direct Respondent No.2 viz. M/s. Garib Nawaz Corporation to pay the arrears in respect of amount of daily entrance fee, if any, as on date two weeks from today and henceforth continue to deposit the contract amount at the rate of Rs. 1,51,415/- per day in advance as per contract.

(v) In the event of default of any of the terms aforestated, the contract in favour of Respondent No.2 viz. M/s.Garib Nawaz Corporation shall stand terminated immediately and Respondent No.2 shall be liable to all consequences following from such termination.

5. The order passed by the Arbitrator stands modified in terms aforestated."

4. It is the specific case pleaded by the petitioner that respondent No.1, without inviting any fresh tenders and contrary to the terms and conditions of the contract and policy of the Government, on 21st August 2004, granted an extension for a period of 3 years on the same terms and increase of 5% in earlier rates. However, condition No.5 of earlier contract was relaxed. This is clearly an arbitrary action amounting to malpractrice and causing huge loss to the State exchequer. It is also averred in the petition that one M/s Deepa Travels Ltd filed Writ Petition No. 353 of 2005 before this Court challenging the said extension. The said Petition was, however, withdrawn on 11th April 2005. Despite this the petitioner has questioned the legality and propriety of the said order on the ground that there are large number of persons who hold expertise and sufficient qualification to submit tenders for performing the said function and would have paid much higher amount than what was

demanded by respondent No.1, at the behest of respondent No.6 from respondent No.2. This action is stated to be contrary to law. In view of the terms and conditions of the agreement and notice inviting tenders, it is not permissible to grant extension in this fashion. It even contemplates that tender should be invited and if the highest bidder does not fulfil the obligation of the contract, same can be awarded prospectively to the second highest bidder. The petitioner, who is an advocate, submitted letters dated 5th October, 2006, 18th October 2006 and 18th November 2006 registering his complaint /grievance but of no consequence. The petitioner has tried to demonstrate the huge losses, which the Government is likely to suffer as a result of the arbitrary action. Certain information was obtained by the petitioner under the provisions of Right to Information Act, vide letter dated 21st December 2006 and supplied by the Respondent No.5, vide their letter dated 10th January 2007, showing that there was no justification for respondent No.2 to apply for extension of earlier contract period for further 3 years during the currency of the previous contract and for respondent No.6 to grant such extension in most arbitrary manner. On this premise, petitioner prays that the extension granted to respondent No.2, vide letter dated 21st August 2004, should be quashed and revoked. The

petitioner also prays for a direction to appoint a committee to examine the loss caused to the State revenue and further prays that Respondent No.1 be directed to invite fresh tenders.

5. On behalf of respondent Nos. 1, 3, 4 and 5, affidavit-in-reply is filed by the Chief Executive Officer, Aarey Milk Colony. The stand taken in that affidavit is that the allegations are primarily made against respondent No.6, The Minister for Dairy Development, Agriculture, Animal Husbandary and on the basis of the record available in the office of the said Department, it is stated that the contract in dispute was awarded to the second respondent for the period from 17th February, 2002 to 16th February, 2005. Vide application dated 21st July, 2004, respondent No.2 claimed that he was paying heavy license fees and if the fresh tenders are called, the Government may not get huge amount or equivalent to the amount being paid by the said respondent. Therefore, the contract for collection of tax on three check nakas may be extended for a period of three years by increasing fee at the rate of 5% and, accordingly, the conditions of the original contract may be amended. At the same time he also requested the Respondent No.6 to waive condition No.5. Respondent No.6 called meetings in this regard

on 21st July, 2004 and 17th August, 2004. In the note put up by the office it was mentioned that there was no provision for extending the period of contract and fresh tender should be invited. At best, the Government could extend the same by three months. The Desk Officer also stated that the file may be placed before the Law and Judiciary Department, Mantralaya, Mumbai. This view was endorsed by the Deputy Secretary of the Department. It appears that the then Secretary of the Department was on tour and file was put up to the Minister twice without the same having been seen by the Secretary. Respondent No.6 approved the proposal on 19th August, 2004, for extending the contract as prayed for waived condition No.5 of the original contract and directed insertion of a new condition allowing Respondent No.2 to withdraw from the contract by giving 60 days notice to the Government. Again, approval was sought for issuance of the order and finally on 21st August, 2004, the order was passed and extension of contract was awarded to respondent No.2 for a period of three years by increasing nominal 5 per cent contract amount. It is averred in the affidavit on behalf of the State that the amount of three years was worked out at Rs. 16.58 crores and was payable daily. The amount so payable per day works out to nearly Rs. 1,51,415/- and on an annual basis it works

out to approximately Rs. 5 crores. There was no occasion to consider second highest bidder as fresh tenders were not invited. Respondent No.2 has already availed of the benefit of contract in his name without any liability and the Government claims to have suffered losses and now if the contract is awarded to a new contractor which is of a lower value than in terms of condition No.5, respondent No.2 should also make good loss to the Government.

6. During the course of hearing on 25th June, 2007, the learned counsel appearing for respondent No.6 sought time to seek instructions in view of the afidavit filed on behalf of the State and particularly paragrphs 5 and 6 of the said affidavit. On the next date of hearing on 28th June, 2007, the learned counsel for respondent No.6 again stated that the said respondent had decided to review his order which is subject matter of the present writ petition and, therefore, prayed for time. The Court had directed production of original records in Court.

7. Respondent No.6, despite specific allegations made against him, chose not to file any affidavit. From the record produced in furtherance to the order of the Court, it appears that Mr. Anees Ahmed, Minister for

Agriculture, Animal Husbandry, Dairy Development and Fisheries, during the pendency of the writ petition, had issued a show cause notice on 28th June, 2007, directing that the decision taken earlier may be reviewed. Written reply was filed on behalf of respondent No.2 before the Minister and it was heard on 5th July, 2007 and after going through the records, the Minister vide his detailed order dated 11th July, 2007, held that the decision for extension of the agreement dated August 18, 2004 was for valid reasons. The relevant part of the said order reads as under:-

> " After giving consideration to the oral and written submissions made by Shri Joshi learned Counsel, I am of the opinion that the earlier contract granted in favour of the said Corporation without inviting tenders was for valid consideration and it was best in the interest of the State from the point oif view of collection of toll. At the time when the decision for the extention of agreement was taken the link roads were expected to be operational by 2005, which could have caused substantial loss of revenue, as both the said link roads are toll free. The said link roads were, however, not operational in 2005, as contemplated earlier, but became operational in 2006. Since then, I am given to understand that the vehicular traffic on Aarey Milk Colony Road has substantially reduced. The decision taken by me in the year 2004 was, therefore, correct and valid for appropriate consideration. However, since objection has been raised of denying equal opportunity for other potential bidders by virtue of not issuing tender notice, carries a valid point and, therefore, it will be necessary to issue fresh tender notice calling for bids in the changed circumstances. The

tenders are issued as and by way of practice by the Government Department and to provide equal opportunity to the citizens to deal with Government largesse. There was possibility earlier, of receipt of bid for lesser amount and, therefore, the decision to continue with the said corporation for collection of toll was taken. The interest of justice would, however, be served by allowing the said Corporation to continue with the collection of toll till fresh tender process is complete and the new contracting party is selected by the Government. Till that time the said Corporation be permitted to collect toll on same terms and conditions i.e. on payment of Rs. 1,58,987/- per day to the Government as licence fee.

Clause 24 of the agreement signed by the said Corporation provides the change of condition in the agreement by CEO, Aarey Milk Colony, and since the learned Counsel for the said Corporation Shri Bipin Joshi has also consented for the restoration of clause 5 in its originalform incorporated in the agreement dated February 16, 2002, I hereby direct the restoration of the said clause in the Agreement signed by the said Corporation as it was incorporated in the agreement dated February 16, 2002.

I further direct that fresh tender notice shall be issued by the Department inviting bids at minimum Rs. 1,58,987/- per day, which is presently being paid by the said Corporation as a pre-condition to enter the bids. Since during the pendency of completion of tender and bidding process, the Government as well as Aarey Milk Colony does not have any administrative machinery for collection of toll, the said Corporation be allowed to continue the collection of toll at the rate of Rs. 1,58,987/- per day.

Since the decision for extention of agreement dated August 18, 2004 was for valid reasons and consideration, the said agreement is not terminated, however, shall remain in force with the additional terms and conditions,

> as mentioned hereinabove, and till the new contracting party is selected by the Government of Maharashtra by following due procedure of law inviting tenders."

8. The question arose before the Court, whether the stand taken by the Minister in his order dated July 11, 2007 was the stand of the Government. During the hearing, it is revealed that the decision of the Minister was not quite acceptable to the Government. The Government was granted opportunity to state its stand on affidavit. Resultantly, additional affidavit dated 28th July, 2007 was filed on behalf of the State wherein it was specifically stated that the decision of the Minister was not acceptable to the Government and the reasons thereof were stated as under:

> " I say that Respondent No.4, Secretary, Agriculture, Animal Husbandry, Dairy Development & Fisheries Department, Government of Maharashtra, sought the Government's orders on its stand taken on the review order dated 11th July, 2007, passed by the Respondent No.6. The stand of the Government is as under:
>
> 1) Extent of loss cannot be ascertained.
> 2) Relaxation of Condition No.5 was not proper.
> 3) There are procedural lapses.
>
> The review carried out by the Hon. Minister cannot be accepted by the Govt. as he has not terminated the earlier contract.

... ...

6. In any event, I say that the contract awarded by way of extension has not been terminated by action in issue by the Respondent No.6 and therefore the said extension continue to benefit the contractor at the cost of the public exchequer.

7. I say that in the meantime, as per the .directions given by the respondent No.6, the respondent No.5 has published the advertisement calling for the tender for collection of toll tax at 3 Check Nakas at Aarey Milk Colony. Hereto annexed and marked Exhibit-1 is a copy of the said advertisement.

8. I say that in view of the aforesaid fact the decision of the respondent No.6 in Review is not acceptable to the Government of Maharashtra."

Along with this affidavit, Exhibit-1 was annexed which is the tender notice issued by the Chief Executive Officer, Aarey Milk Colony,Goregaon (East), Mumbai, inviting fresh tenders for three check nakas of that area.

9. Respondent No.2 also filed an independent affidavit stating that the contract was awarded to him by the Chief Executive Officer on 23rd August, 2004, by enhancing royalty of 5 per cent for a period of three years. It is also stated that additional Bank Guarantee of Rs. 8,29,000/- for a period of three years was furnished by him, in addition to the Bank

Guarantee already given as well as depositing an additional security deposit of Rs. 4,14,500/-. In this affidavit he has also given some instances wherein the Maharashtra State Road Transport Corporation had also granted extension in the same manner and even Mahanagar Telephone Nigam Limited also extended contract for sale of empty cable drums after the expiry of the tender period and thus it is a practice to extend contracts after the expiry of the tender period. On this basis, it is submitted that no procedural infirmity has been committed by the authorities in first awarding and then extending the contract to the said respondent which is valid upto 2008.

10. It may also be noticed that Notice of Motion No. 328 of 2007 was taken out by one Shaikh Afroz Ahmad, who claims that he is one of the contractors involved in the business and that the extension granted to respondent No.2 permitting him to continue to collect the toll from three nakas should be cancelled as there is no power to grant such extension beyond the period of three months and the State should invite open tenders. He has further specifically averred that respondent No.1 has awarded and extended period of many contracts after the expiry of the period specified therein in an arbitrary manner and he has given a few

examples of such contracts, which read as under:

"(i) I say that in respect of contract for Boat Club at Chota Kashmir at Aarey Colony, Goregaon (East), Mumbai in October, 2000, the contract for three years was bided by one Mr. Ashok Guru Singh, who was then successfully awarded the contract upto October, 2003. However, thereafter, from time to time, the contract has been extended in his favour without calling a fresh tender upto 2006 and till date, he continues to operate the Boat Club at Chota Kashmir, even though the extended period has also expired.

(ii) Similarly, in respect of Aarey Garden Restaurant, in October, 2000, the contract for three years was bided by one Mr. Sunil Tukaram Maradkar, who was then successfully awarded the contract upto October,2003. However, thereafter, from time to time, the contract has been extended in his favour without calling a fresh tender upto October, 2006 and till date, he continues to operate the said Aarey Garden Restaurant, even though the extended period has also expired.

(iii) In respect of Shailaja Provision Stores at Aarey Market, in February 2001 the contract for three years was bided by one Mr. M.N. Patel who was then successfully awarded the contract upto February, 2004. However, thereafter, from time to time, the contracct has been extended in his favour without calling a fresh tender upto February, 2007 and till date, he continues to operate the said Shailaja Provision Stores, even though the extended period has also expired.

(iv) In respect of a Jyotsna Stores at Aarey market, the contract for three years was bided by one Mr. S.S. Shah in February, 2001 who was then successfully awarded the contract upto February, 2004. However, thereafter from

time to time, the contract has been extended in his favour without calling a fresh tender upto February, 2007 and till date, he continues to operate the same, even though the extended period has also expired.

(v) In respect of a Laundry at Aarey Market, the contract for three years was bided by one Mr. S.S. Shah in February, 2001 who was then successfully awarded the contract upto February, 2004. However, thereafter, from time to time, the contract has been extended in his favour without calling a fresh tender upto February, 2007 and till date he continues to operate the same, even though the extended period has also expired.

(vi) In respect of removal of water from wall behind Agriculture Department rest room and Gat No.8, the contract for three years was bided by one M/s. Nilesh Enterprises in July, 2001 who was then successfully awarded the contract upto July 2004. However, thereafter, from time to time, the contract has been extended in his favour without calling a fresh tender upto July 2007 and till date, he continues to operate the same.

(vii) In respect of Plantation at Agriculture Department, Powai area – 19 acres and 20 gunthas, the contract for three years was bided by one Mr. Jatashanker R. Dubey in August, 2001 who was then successfully awarded the contract upto July, 2007. However, thereafter from time to time, the contract has been extended in his favour without calling a fresh tender upto July, 2007 and till date he continues to operate the same.

(viii) In respect of Plantation at Agriculture Department (Colony) area 24 acres and 22 gunthas, the contract for three years was bided by one Mr. Depak Manubhai Patel in September, 2001 who was then successfully awarded the contract upto September, 2004. However, thereafter, from time to time, the contract has been extended in his favour without calling a fresh tender upto September, 2007

and till date, he continues to operate the same.
(ix) In respect of Plantation at Agriculture department Powai, area 20 acres, the contract for three years was bided by one Mr. Parshuram R. Gutuka, in August, 2001, who was then successfully awarded the contract upto August, 2004. However, thereafter from time to time the contract has been extended in his favour without calling a fresh tender upto August 2007 and till date he continues to operate the same."

This Notice of Motion was heard along with the writ petition and the averments made in the affidavit in support of this Notice of Motion are not much in dispute.

11. From the above pleadings of the parties and the record produced before the Court, it is clear that there was a dissent recorded by some of the Officers of Respondent No.1 for granting extension to respondent No.2 on the basis of his application dated 21st July, 2004. However, the concerned Minister had taken a decision to extend the period of the contract by three years by waiving condition No.5 as well as by enhancing the royalty payable by 5 per cent. This decision of the Minister has been questioned in the writ petition. During the pendency

of the writ petition, the decision has been modified by the Minister, on his own, after hearing Respondent No.2. By the amended decision, it was decided to restore clause 5 of the original terms and conditions of the contract. It was stated that the decision taken by him earlier was correct and further he directed that fresh tenders be invited and until that time respondent No.2 should be permitted to continue the collection of the tolls at the three check nakas. This decision of respondent No.6 is not acceptable to the State. It has given various reasons for not agreeing to the said decision. Firstly, that the extension of the contract has not been terminated, secondly the relaxation of condition No.5 was not proper, thirdly proper procedure had not been followed in the decision for granting extension and fourthly the extent of loss suffered by the Government cannot be ascertained in exact terms. In other words, this amended decision, of course, was not in favour of respondent No.2 but at the same time it did not set the things right which were done incorrectly according to the petitioner, intervenor and even some of the respondents.

12. The learned Assistant Government Pleader, while relying upon the Maharashtra Government Rules of Business and Instructions issued

thereunder, contended that every Minister of the Government is obliged to act in accordance with the Rules and established procedure for running the administration. In terms of Rule 10.1, the Minister-in-charge of a Department shall be primarily responsible for the disposal of the business pertaining to their department. Rule 10.2 places an obligation upon each Minister to transmit to the Chief Minister of such information as may be demanded by him. Rule 11.2 states that no proposal which requires the previous consultation of the Finance Department under sub-rule (1) but in which the Finance Department has not concurred, may be proceeded with unless a decision to that effect has been taken by the Council of Ministers. The instructions contained in Part-II of the Rules of Business also contemplate, in paragraph 15 (1) (xiv), that if there is any departure from the rules and even the instructions, which comes to the notice of the Chief Secretary or the Secretary in any Department, the same shall be submitted to the Chief Minister before issuance of orders.

13. It is contended on behalf of the State that the decision taken by the Minister on the one hand violates the instructions/Rules aforeindicated while on the other it is arbitrary and is not in consonance

with the prescribed procedure for the reasons stated in the reply affidavit filed on behalf of the State and noticed by us above.

14. In the case of *M/s. Erusian Equipment & Chemicals Ltd.* vs. *State of West Bengal and another, (*1975) 1 SCC 70, the Supreme Court laid new dimensions of Administrative Law and held that before a party could be blacklisted for dealing with the State in commercial items, it was entitled to a notice in accordance with the principles of natural justice. Equality of opportunity was made available to public contracts. It was held that the Government cannot choose to exclude by discrimination. The Government is a Government of laws and not of men. Nobody could claim right to enter into a contract but those who offer tender or quotations for its dealing with the State in commercial commodities are entitled to equal treatment. Adherence to principle of equality with absence of arbitrariness and discrimination in transactions of the State was essential as Government functioning have a public element, thus they should be fair. Judicial review of administrative action has gained wider application and higher standards. Adherence to basic rule of law and principles of natural justice is a mandatory requirement in an administrative action. This rule is equally applicable

where the State attempts to distribute its largesse or enters into contract in its trade activity. Fairness in State action is an essential requirement of its activities. Extraneous considerations must be kept out and the decision should be taken on relevant considerations objectively to ensure fair competition amongst the eligibles, that too by following due procedure.

15. In relation to contractual matters, the Courts have consistently held that public authority or the State Government should not have unfettered discretion and doctrine of executive necessity has limited application in such actions. In the case of *Sterling Computers Limited* vs. *M/s. M & N Publications Limited and others,* (1993) 1 SCC 445, the Supreme Court held as under.

> "... ... That is why the Courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due

course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

13. But in normal course some rules must exist to regulate the selection of persons for awarding contracts. In such matters always a defence cannot be entertained that contract has been awarded without observing the well-settled norms and rules prescribed, on the basis of the doctrine of "executive necessity". The norms and procedures prescribed by Government and indicated by courts have to be more strictly followed while awarding contracts which have along with a commercial element a public purpose as in the present case. The publication of directories by the MTNL is not just a commercial venture; the primary object is to provide service to the people.

14. The action or the procedure adopted by the authorities which can be held to be State within the meaning of Article 12 of the Constitution, while awarding contracts in respect of properties belonging to the State can be judged and tested in the light of Article 14 of the Constitution, is settled by the judgments of this Court in the cases of *Ramana Dayaram Shetty v. International Airport Authority of India,* AIR 1979 SC 1628; *Kasturi Lal Lakshmi Reddy v. State of J & K,* AIR 1980 SC 1992; *Fertilzier Corpn Kamgar Union (Regd.),Sindri v. Union of*

India, AIR 1981 SC 344; *Ram and Shyam Co. v. State of Haryana,* AIR 1985 SC 1147; *Haji T.M. Hassan Rawther v. Kerala Financial Corporation, AIR 1988 SC 157; Mahabir Auto Stores v. Indian Oil Corpn.*, *AIR 1990 SC 1031 and Shrilekha Vidyarthi v. State of U.P. AIR 1991 SC 537.* It has been said by this Court in Kasturi Lal:

> " It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so."

15. There is nothing paradoxical in imposing legal limits on such authorities by courts even in contractual matters because the whole conception of unfettered discretion is inappropriate to a public authority, who is expected to exercise such powers only for public good."

16. The power of the public authorities are, therefore, essentially different from those of private persons. A private person may deal with his properties and rights the way he feels proper, even if to others it may appear ex facie arbitrary. Such relaxation is not available to a public authority much less the government. The Government must exercise its discretion fairly and within the specified limitations. The rules of

business of the Government would control its functioning and the persons in high position have to ensure all reasonable care and caution that no loss is caused to the affairs of the Government particularly in terms of money. So far as the rules of business are not offending the statutory Rules, they would be binding and enforceable. Though a Minister would have powers to take decisions in regard to his Department but if such a decision is taken contrary to the rules of business or is patently arbitrary, the same may not bind the Government. In the case of *Rajureshwar Associates* vs. *State of Maharashtra and others,* (2004) 6 SCC 362, the Supreme Court, while dealing with a somewhat similar situation, where the stand of the Government was different than the stand taken by the Ministry of Textiles and in a subsequent decision the Government cancelled the agreement of sale in favour of the appellant held as under:

> "41. Rule 9 provides that all cases referred to in the Second Schedule shall be brought before the Council of Ministers. Entry 15 in the Second Schedule provides that any proposal which affects the finance of the State which does not have the consent of the Finance Minister has to be placed before the Cabinet. Similarly, Entry 17 provides that proposal involving alienation either temporary or permanent by way of sale, grant or lease of government property exceeding Rs. 50,000/- in value of the

abandonment or reduction of a recurring revenue exceeding that amount or the abandonment of revenue exceeding Rs. 5 lakhs except when such alienation, sale, grant or lease of government property is in accordance with the Rules or with a general scheme already approved by the Council. It is evident that requirement of these Rules was not complied with at the time when the decision dated 23-10-2000 was taken by the Textile Minister to sell the entire land in favour of the appellant....."

"47. The note of the Chief Secretary sets out the correct approach that the action be taken in accordance with law. But the Minister of Textiles went by the incorrect approach suggested by the Department of Textiles. The decision so taken by the Minister of Textiles and the consequent sanction dated 23-10-2000 is vitiated in law. The sanction so granted cannot be termed in law as the grant of permission by the Government in accordance with the Rules and the procedure prescribed.

48. In the circumstances, when the Chief Minister had occasion to consider the matter when an offer was received from Mr. Save, he was right and justified in directing re-tender. Such direction was in keeping with the views expressed by the Departments of Revenue and Finance. The matter was considered further after noting that the Chief Minister at various levels including the Legal Department and the final decision was taken on 27-11-2001. This decision, it appears from the file, is on account of the Government's belief that the price of Rs. 7,81,33,000 was an undervaluation of the subject property which is a prime land located within the Corporation area. The Divisional Commissioner, Aurangabad vide his communication dated 8-8-2001 as well as 23-10-2001 brought to the attention of the State Government that the market value of the property was in the range of Rs. 24-25 crores. When the offer of the appellant was received, no valuation of the land had been got done. The liquidator could not have invited tenders for the entire land as out of

> 43 acres 12 gunthas, 38 acres 12 gunthas had been taken possession of by the Government leaving only 5 acres of land on which buildings had been erected. Initial decision was to sell 5 acres of land along with the building and machinery standing thereon. The Revenue Department as well as the Finance Department had not agreed for the sale of the entire land. The decision was taken by the Textile Department including its Minister to sell the entire land and the matter was required to be placed before the Cabinet and in the absence of any proper sanction the Government had the power to cancel the same especially when it was of the opinion that the price of Rs. 7,81,33,000/- offered by the appellant was undervaluation of the property. The High Court was right in coming to the conclusion that the State Government did not, at any time, give any approval for the sale or disposal of the subject land as was claimed by communication dated 23-10-2000."

17. While dealing with the aspect of distribution of State largesse or contractual obligations of the State, the principles of public trust and public accountability have to be applied in judicial determination. The State authorities should exercise discretion in awarding contracts but such discretion should be fair and in public interest. They should be free of arbitrariness and nowhere should amount to misfeasance in public office. In the case of *Shivsagar Tiwari* vs. *Union of India and others*, (1996) 6 SCC 558, the Supreme Court while setting aside the discretionary allotments made by the Minister of Urban Development to

his employees, relatives, etc. even directed that this amounted to misuse of duty and awarded exemplary damages as actionable in tort.

18. Judicial review of administrative action was further expanded by the Supreme Court in the case of *State of NCT of Delhi and another* vs. *Sanjeev Alias Bittoo,* (2005) 5 SCC 181. The Supreme Court emphasised that the present trend of judicial opinion is to further restrict arbitrariness in the administrative action of the Government referable to executive, legislative or quasi-judicial nature. Though the scope of judicial review was stated to be limited but where the decision-making process was per se faulty and not in conformity with rules, judicial intervention was permissible.

19. Reference in this regard can also be made to the case of *Tata Cellular* vs. *Union of India,* (1994) 6 SCC 651,wherein the Supreme Court has held that unreasonable decision or a decision without proper application of mind or decision with procedural impropriety were the kind of cases which would squarely fall within the limited scope of judicial intervention.

20. Before we examine the facts of the present case in the light of the above principles, another important facet of the case in relation to the doctrine of public accountability and application of Wednesbury principles in State action would be important to be noted. A Division Bench of this Court in the case of *Mohammed Salim Abdul Karim* vs. *The State of Maharashtra and others (Writ Petition No. 1513 of 2006),* commenting upon the fairness in State action, held as under:-

> "4. In the case of Shanti Prasad Agarwal and ors vs Union of India and ors, -1991 Supp (2) Supreme Court Cases 296, the Supreme Court clearly stated that the administrative law requires that in an administrative action, while adhering to the principles of natural justing, passing of a speaking order would be desirable. In the case of Shri *Mahender Kumar vs Land Acquisition Collector*, W.P(C) No.13308-12 of 2005 dated 11th May 2006, the Division Bench of the Delhi High Court observed as under:
>
> > "....Wherever a cause is relatable to breach of statutory or implied duty of a public officer, the rule of law would essentially provide for a remedy even if it is not so specifically spelled out in the provisions of the Act. Arbitrariness and unreasonableness being facets of Article 14 are available as grounds not only for questioning an administrative action but in certain cases may even invalidate subordinate legislation. Timely action is the essence of government functioning and unreasonable delay questions the very correctness of such orders. Wherever the records offer no explanation for prolonged

unreasonable delay, the equity will tilt more in favour of the petitioners than uphold the action of the authorities to be correct, being done in the normal course of its business....."

".....Concept of public accountability has been applied to the decision making process in the government by the courts for a considerable time. This concept takes in its ambit imposition of costs and its recovery from the officer concerned for their negligence or acts of prolonged, unexplained delays running into years. In the case of State of Andhra Pradesh vs. Food Corporation of India 2004 (13) Supreme Court Cases 53, the Court directed as under:-

"We are shocked as to the manner in which the State Government is filing petitions in this Court resulting not only in wasting the time of this Court and all others concerned but in total waste of public money. The impugned orders have been challenged after more than eight years with almost no explanation, as is evident from the paragraph reproduced above"

".....The doctrine of full faith and credit applied to the acts done by the officers and presumptive evidence of regularity of official acts done or performed, is apposite in faithful discharge of duties to elongate public purpose and to be in accordance with the procedure prescribed. It is now settled legal position that the bureaucracy is also accountable for the acts done in accordance with the rules when judicial review is called to be exercised by the Courts. The hierarchical responsibility for the decision is their in-built discipline. But the Head of the Department/designated officer is ultimately responsible and accountable to the Court for

the result of the action done or decision taken. Despite this, if there is any special circumstance absolving him of the accountability or if someone else is responsible for the action, he needs to bring them to the notice of the Court so that appropriate procedure is adopted and action taken. The controlling officer holds each of them responsible at the pain of disciplinary action. The object thereby is to ensure compliance of the rule of law"

".....It is known fact that in transaction of the Government business, none would own personal responsibility and decisions are leisurely taken at various levels. It is not uncommon that delay would be deliberately caused in filing appeal or revision by Government to confer advantage to the opposite litigant; more so when stakes involved are high or persons are well connected/influential or due to obvious considerations. The Courts, therefore, do not adopt strict standard of proof of every day's delay. The imposition of costs on officers for filing appeals causes public injustice and gives the manipulators an opportunity to compound the camouflage. Secondly, the imposition of costs personally against the officers would desist to pursue genuine cases of public benefit or importance or of far-reaching effect on public administration or exchequer deflecting course of justice. The principle of care, maintenance of higher caution, expeditious decision-making process in exercise of statutory powers, public accountability and transparency are also applicable to the various proceedings under the law of acquisition. Various provisions of the Act could be referred to demonstrate that the exercise of powers eminating from statutory

> provisions is coupled with public obligation, to protect the rights of the land owners....”
>
> 6. The basic rule of law is truly applicable to the administrative acts as well. The need for reasoned orders and prompt action by the State administration is the requirement of the day".

21. The concept of public accountability has been applied to the decision making process in the Government by the courts for a considerable time. Administrative or executive actions are subject matter of judicial review. Defining this role, the Supreme Court in the case of *State of Bihar* vs. *Subhash Singh*, AIR 1997 SC 1390 held as under:

> "In our democracy governed by the rule of law, the judiciary has expressly been entrusted with the power of judicial review as sentinal in qui vive. Basically judicial review of administrative actions as also of legislation is exercised against the actions of the State. Since the State or public authorities act in exercise of their executive or legislative power, they are amenable to the judicial review"
>
> "..... The normal principle that the permanent bureaucracy is accountable to the political executive is subject to judicial review. The doctrine of "full faith and credit" applied to the acts done by the officers and presumptive evidence of regularity of official acts done or performed, is apposite in faithful discharge of duties to elongate public purpose and to be in accordance with the procedure prescribed. "

22. The decision of the Delhi High Court in the case of *Major General B.D. Wadhwa* vs. *Union of India and others (W.P. (C) No. 10630/2006)*, at this stage can be usefully referred to:

> " The main line of arguments raised on behalf of the petitioner is that the Court is entitled to investigate the action of the authorities with a view to see, whether it has taken into account matters which ought not to have been taken into account or conversely has refused or neglected to take into account the matters which it ought to take into account. It is also contended that no promotion board or authority can exercise unfettered discretion. The process of selection should essentially be in conformity with the basic rule and should not be arbitrary, discriminatory in its form and conclusion. In support of his contention, he relied upon the juudgments of *Associated Provincial Picture Houses Ltd.* vs. *Wednesbury Corporation*, 1947 (2) All ER 680 and *Air Vice Marshal Harish Masand* vs. *Union of India & Ors.*, 2004 VIII AD (Del.) 429.
>
> 15. On the other hand, the learned counsel appearing for respondent No.4 with some vehemence contended that the power of judicial review of such administrative actions has inbuilt limitations. "Reasonableness" and "Rationality" or even "Proportionality" of decision making process can be examined within a very limited scope (Refer *R.M. Arunachalam vs. Commissioner of Income Tax, Madras,*1997 (7) SCC 463).
>
> 16. Further, it is contended that the competent authority can select any person, not necessarily the senior most, keeping in view the service profile of the candidate and judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision as such. In this regard, reliance has been placed to the case of *Union of India and ors. vs. Lt. Gen. Rajendra Singh Kadyan and*

> *another,* 2000 (6) Supreme Court Cases 698. Emphasizing on the restricted scope of judicial review under Article 226 of the Constitution of India, it is also contended that the Court does not act as an Appellate Authority and even if a decision taken by the Government does not appear to be agreeable to the Court, the Court would not interfere unless such decision was offending the above rules of law (Refer: *Ekta Shakti Foundation vs. Govt. Of NCT of Delhi,* JT 2006 (6) SC 500."

23. Usefully, a reference can also be made in regard to the judgments of the Supreme Court in the cases of (i) *Secretary, Jaipur Development Authority, Jaipur* vs. *Daulatmal Jain and others,* (1997) 1 SCC 35, (ii) *Vineet Narain* vs. *Union of India,* AIR 1998 SC 889, and (iii) *Kumari Shrilekha Vidyarthi etc. etc.* vs. *State of U.P. and others,* AIR 1991 SC 537.

24. On the basis of the undisputed facts, as aforenoticed by us, the Court needs to squarely deal with the question whether the decision of the Minister, contrary to the note of the Department and without complying with the instructions and the procedure provided by rules of business, can be termed reasonable, bona fide and free of arbitrariness or it is a decision taken in colourable exercise of power and devoid of public interest. There is no dispute that respondent No.2 was the

successful bidder and was awarded the contract for a period of three years from 16th February, 2002 to 16th February, 2005. Condition No.5 of the agreement is most important for our purpose. It creates a liability upon the contractor that in the event he shows incapability to execute or perform his part of the contract, the contract shall be cancelled and his security deposit amount shall not be refunded to him. It further imposes a liability that in the event of cancellation of contract as above and if the contract is awarded to another contractor at a lesser amount, the losses suffered by the Government to that count would be recovered from the security deposit of the contractor and remaining amount can be recovered from his immovable properties.

25. There was no term in the original agreement giving authority to extend the period of earlier contract by further three years i.e. 17-2-2005 to 17-2-2008. Clause 2 of the agreement dated 16th February, 2002 stated that if it is necessary to increase the time period of the contract as per the decision of the Government, then there will be an increase of three months period to the contractor as per the terms and conditions mentioned therein. Clause 3 further provides that after the expiry of the contract period, the Contractor is required to hand over

possession of the three Nakas to the Chief Executive Officer on "as is where is basis" without objecting to the same.

26. On 21st July, 2004, respondent No.2 made a representation to the authorities for grant of extension of the earlier tender period. In the affidavit filed on behalf of the said respondent, it is nowhere stated as to under what circumstances and why the said respondent No.2 had applied for extension of the contract. As already noticed, this extension was granted by the authorities and a new contract was entered into on 23rd August, 2004 which obviously deleted condition No. 5 of the earlier contract. Respondent No.6 has attempted to justify the order of granting extension. Interestingly, in the order now passed by respondent No.6 on 11th July, 2007, it is recorded that the extension of three years was prayed by respondent No. 2 on the ground that since they were paying heavy licence fees, some relaxation in the terms and conditions of the agreement was needed by giving them concession of 5 per cent increase and to leave the site by giving 60 days' notice. It is also recorded in the said order that upon opening of Link Roads, there would be substantial revenue loss in collection of the toll and it would be in the interest of the Government to increase the payment by

5 per cent in the licence fee at the rate of Rs. 1,58,987/- per day instead of Rs.1,51,415/- per day. Strangely the order itself records that the roads were scheduled to be completed by 2005 i.e. after the expiry of the contract period. The construction of toll free link roads with six lanes as an alternative to the Aarey Milk Colony Road could hardly be stated to be a reason which binds the Government to extend the contract by increasing 5 per cent of the licence fees. The records produced before the court showed that the Department at different levels had objected to such extension and it was remarked that matter should be referred to the Law and Judiciary Department. This fact was noticed in the order dated 11th July, 2007, which reads as follows:

> "It was also pointed out to me contemporaneously that the drafting of the terms and conditions for such agreement was pending with the Law and Judiciary Department, Government of Maharashtra and the draft agreement has not been received by my department despite a requisition to that effect. During the pendency of receipt of draft agreement from Law and Judicial Department, in order to show fairness and justness in the State action, I allowed modification of clause 5. My decision to allow the modification and grant of extension of the period of agreement was based on the discussions, I had with Senior Officers of my Department, such as the then Deputy Secretary Mr. Shyam Kumar Dhakate, the Desk Officer Shri Pawar, the CEO Shri Aade and Dairy Commissioner Shri Baldeo Chand. Both the decisions taken by me were in

> accordance with the settled norms of departmental discipline and procedure."

Both the reasons given for variation of condition No.5 appear to be factually incorrect. Firstly, respondent No.6 could have easily waited for finalisation of the draft agreement from the Law and Judiciary Department and, in any event, he ought to have sought information from the said Department. Secondly, the office note produced before us is contrary to the alleged discussion that is stated to have taken place between the officers and Respondent No.6. The minutes annexed in the file do not support the reasoning recorded in the order of the Minister dated 11th July, 2007. According to the affidavit filed on behalf of the State, the stand taken by the Minister was stated to be not acceptable to the Government. The petitioner in his rejoinder has categorically stated that other contracts were illegally extended by permitting increase in the licence fee to the extent of 10 per cent, 15 per cent and 20 per cent for the next three years. It is averred that in three years the amount payable to the Government would be more than Rs. 7,46,10,000/- and the loss caused by deletion of condition No.5 would be at the rate of Rs. 8,000/- per day which is exclusively the responsibility of respondent No.6 and the said respondent should be

directed to make good the revenue loss to the State.

27. A somewhat interesting stand has been taken by Respondent No.2 in the affidavit filed by him wherein it is stated that it is not obligatory or mandatory on the part of the State to invite tenders in all matters and the petitioner cannot find fault with the method of working of the State Government. The respondents have experience and they can achieve the best offers suitable to them by any process that they find proper. The extension of three years subject to enhancement of 5 per cent was in the interest of the State exchequer. The stand of this respondent is contrary to the well accepted norms stated in the above judgments and, in fact, can hardly be justified. Unlike a private individual, it is obligatory upon the State to adopt fairness in its action including trade activity like inviting tenders for its works or appointing collection agencies for revenue collection. The purpose should be to adopt fair method and ensure protection of State rights without any detriment to financial interest of the State. The intervenor, Shaikh Afroz Ahmad, in Notice of Motion No. 328 of 2007, has not only pointed out the lacunae factually and legally in grant of extension of three years by respondent No.6 in favour of respondent No.2 but also brought on

record arbitrary and discriminatory acts where the tender periods are being extended in a very casual manner on meagre increase of the charges payable under the terms and conditions of the tender.

28. The allegations made in the writ petition of colourable exercise of power and arbitrariness by the petitioner, clarificatory facts stated in the affidavit-in-rejoinder by the petitioner and facts given by the intervenor remain uncontroverted as far as respondent No.6 is concerned. Respondent No.6, of his own accord and for reasons best known to him, chose not to file any affidavit to controvert these facts. Once averments are made on an affidavit in a proceeding before the Court, it is expected of the authorities concerned to admit or deny them specifically and, if necessary, provide due explanation before the Court so as to justify the action taken and to reflect on record the bona fide nature of the transactions. In absence of such specific denial, the Court is compelled to draw an inference that the allegations made in the writ petition are not disputed, if not would be deemed to have been admitted. It was expected of Respondent No.6 to specifically admit or deny such allegations in the event he expected the Court not to draw such inference or take those allegations as admitted. Reference in this

regard can be made to the judgment of the Supreme Court in the case of *R.P. Kapur and others* vs. *Sardar Pratap Singh Kairon and others*, AIR 1961 SC 1117, wherein the Supreme Court has held as under:

> "Before parting with this case we consider it necessary to make some observation with regard to a matter which has caused us some anxiety and concern. Serious allegations have been made against the Chief Minister in this case. He is a party respondent and had notice of the allegations made. In Sethi's complaint it was alleged that he had passed certain orders on the original complaint, which was sent to the Additional Inspector General of Police with those orders. The original complaint was not made available to us on the ground that it could not be traced. The Additional Inspector General of Police said in his affidavit that on receiving the complaint from Sri. M.L. Sethi, he ordered the investigation of the case without any order or direction from the Chief Minister. He did not specifically say if he received the complaint direct from Sethi or through the Chief Minister. In Dhingra's case the Chief Minister passed an order which might either mean that he ordered the submission of a prima facie repoert or merely directed that a report should be submitted if a prima facie case was made out. It is not clear why he ordered the seizure of papers before even a prima facie report was given, in respect of an offence said to have been committed five years ago. There are all matters on which the Chief Minister alone was in a position to enlighten us. In view of the allegations made against him, we consider that the Chief Minister owed a duty to this Court to file an affidavit stating what the correct position was so far as he remembered it. We recognize that it may not be possible for a Chief Minister to remember the circumstances in which a document passes through his hands; there must be many papers which a Chief Minister has to deal with in the day to day business of administration. If the Chief Minister did not remember the circumstances, it would have been easy

> for him to say so. If he remembered the circumstances he could have refuted the allegations with equal ease. This is not a case where the refutation should have been left to Secretaries and other officers, who could only speak from the records and were not in a position to say why the Chief Minister passed certain orders. The petitioners are obviously suffering from a sense of grievance that they have not had a fair deal. We have held that there is no legal justification for that grievance; but in executive as well as judicial administration, justice must not only be done but it must appear that justice is being done. An affidavit from the Chief Minister would have cleared much of the doubt, which in the absence of such an affidavit arose in this case."

29. In *Smt. Naseen Bano* vs. *State of U.P. and others,* AIR 1993 SC 2592, the Supreme Court held that since the averments were not controverted by the respondents, the High Court should proceed on the basis that averments had been admitted by the respondents. The Supreme Court observed thus:

> "The aforesaid reply would show that on behalf of respondent Nos. 1 to 4, it was not disputed that 40% posts which have to be filled up by promotion had not been filled up and the denial of promotion to the appellant was justified on the sole ground that she was not qualified to be promoted to L.T. Grade. This shows that in the pleadings before the High Court, there was no contest on the question that the post of L.T. Grade which was sanctioned in August 29, 1977 was required to be filled up by promotion for the reasons that 40% posts had not been so filled. Even though there was no contest on this question the High Court has gone into it and has held that the appellant has failed to establish her case that at

the time of the appointment of respondent No.6 by direct recruitment 40% of the total number of posts in the college were not filled up by promotion as prescribed by Regulation 5 (2) (a) of the Regulations. Since no dispute was raised on behalf of respondent Nos. 1 to 4 in their reply to the averments made by the appellant in the writ petition that 40% of the total number of posts had not been filled by promotion inasmuch as the said averments had not been controverted the High Court should have proceeded on the basis that the said averments had been admitted by respondents.

30. In the case of *Jagit Singh* vs. *State of Haryana and others*, (2006) 11 SCC 1, the Supreme Court held as under:

"81. The Speaker has not filed any reply. It is true that the aforesaid averments have remained unrebutted.

82. The contention is that adverse inference should be drawn against the Speaker and the impugned order be set aside on the ground of mala fides of the Speaker.

83. The question of drawing adverse inference in view of the Speaker not rebutting the aforesaid averments would depend upon the satisfaction of the Court, having regard to the facts and circumstances of the case. Ordinarily, the adverse inference can be drawn in respect of allegations not traversed, but there is no general rule that adverse inference must always be drawn, whatever the facts and circumstances may be. The facts and circumstances of the present case have already been noticed as to how the petitioners have been avoiding to appear before the Speaker; how the proceedings were being delayed and long adjournments sought on grounds such as non-availability of Senior Advocates because of court vacations. In the light of these peculiar facts and circumstances, a telephone call like the one alleged can

> mean that further adjournment as sought for by the petitioners is possible if they do not vote in the Rajya Sabha election on 28-6-2004. On fact, we are unable to draw adverse inference and accept the plea of mala fides."

31. Besides the fact that the allegations made by the writ petitioner are not without substance, they also find support from the affidavit of the intervenor. In fact, the stand taken by the Government on behalf of respondent Nos. 1, 3, 4 and 5 itself would be sufficient to set aside the order passed by Respondent No.6 granting extension of the contract for a period of three years. The action of respondent No.6 suffers from the element of arbitrariness and is contrary to the business rules. In his wisdom, respondent No.6 ignored the advice of his Department not to grant extension and, in any case, to seek the opinion of the Law and Judiciary Department. The order of Respondent No.6 thus, to a great extent, was sans the business rules, contrary to the procedure of the Department and ex facie discriminatory. Such an order would certainly be vitiated in law. Respondent No.6, being a Minister in the Government, holds a public office and his functioning is governed by doctrine of public trust. The principle of public accountability is applicable to such office with all its vigour. Greater the power to decide

higher is the responsibility to be just and fair. The dimensions of Administrative law permit judicial intervention in decisions, though of administrative nature, but are ex facie discriminatory.

32. The reasoning given by Respondent No.6 in his order dated 11th July, 2007, reviewing his earlier decision would not make either of them good in law particularly when the order is impugned in the present writ petition. His own satisfaction reiterating that he had taken the earlier decision on reasonable grounds would not convert the arbitrariness into fairness. There is no dispute on record before us that no tenders were invited for all this period and Respondent No.2 has already enjoyed the benefits of an invalid and arbitrary order passed by Respondent No.6 for a period of more than two years. The order of Respondent No.6 granting extension for a period of three years is devoid of any justification, opposed to the rules of procedure and practice of the Department and ex facie discriminatory. It excluded all others who are desirous of participating in the tender for collection of revenue of the area in question. No efforts were made to timely invite fresh tenders and a conclusion de hors any rationale was arrived at resulting in grant of special favour to Respondent No.2. Such an approach would be

unsustainable in law and can hardly be justified on any norms of administrative functioning. The exercise of discretion vested in Respondent No.6 is always circumscribed by proper norms of procedure. In absence of any rationale basis or data, Respondent No.6 arrived at a decision that it was in the interest of the State to grant extension of three years at a nominal increase of 5 per cent, that too while deleting very meaningful term (condition No.5 of the contract) from the new contract. This order can hardly be stated to be in public interest or the State interest. In fact, it is rightly termed as arbitrary even by the State. The element of arbitrariness and discrimination is crystal clear and does not admit any doubt. It is difficult for this Court to accept that the decision of Respondent No.6 dated 11th July, 2007 was for bona fide reasons and in the State interest because the pleading of the parties, the record produced before us, and circumstances of the case are *risque*.

33. The State actions in the domain of contractual matters are subject to judicial review on the touchstone of Article 14 of the Constitution of India. Wherever equality is denied, that too on unsustainable reasons or for no reasons, judicial chastizm is inevitable. Wide sweep of Article

14 undoubtedly takes within its fold the impugned action of the Respondents in exercise of executive power as it has an inbuilt element of discrimination and preferential treatment to Respondent No.2 at the hands of Respondent No.6. The allegations of unfairness and favouritism would have to be examined on their face value, once they are not specifically denied by the concerned person and no material is placed before the Court to demonstrate rationale basis for arriving at such a decision. Even if there was any vacuum in procedural rules, it was the duty of the Executive to supplement the same so as to ensure fairness in its action. The principles of discharging public function are applicable in every democracy and one is expected to bear in mind the in-built limitations caused by basic rule of law and fairness to exercise of power. Objectivity and accountability are the twin essential facets of a public office. The adverse impact of lack of probity in discharge of public duties can result in varied defects not only in the decision making process but in the decision as well. Every public office is accountable for its decision and actions to the public in the larger interest and to the State administration in its governance. The Minister holds public office though he gets constitutional status and performs his functions under the Constitution, law or executive policy. He is not only

responsible for his own act but even of the persons working under him. Public accountability takes within its ambit decisions of the authorities in accordance with Rules, policies and use of discretion circumscribed by requirements of a public office. Governance of rule of law imposes an obligation upon the higher officers in the Government vested with large discretion, to act and take decision with greater conscience and responsibility. There is a fine line of distinction between abuse of power and proper exercise of power. Thus, every action of such Constitutional authority is expected to be in conformity with the prescribed procedure and larger public interest and then alone the action would help to further the goals of fairness in public policy set down in the Constitution of India. Not only the stand taken in the Court by the petitioner but even the stand of the Government, as is clear from its affidavit filed in this case, shows that the action of respondent No.6 is arbitrary and has resulted in considerable financial loss to the public exchequer, however the same undetermined as yet. Refusal on the part of the Government to grant approval to the decision of respondent No.6 sufficiently indicates an element of unfairness and arbitrariness in the decision-making process and the decision of respondent No.6. Besides all this, we are unable to accept the contention raised on behalf of respondent

No.6 that the decision was bona fide and for reasons, which were in public interest. To us, the decision of respondent No.6 appears to be abuse of power vested in him and offends the basic norms of public authority and public accountability relatable to performance of public duty. Respondent No.6, who holds public office by virtue of his Constitutional status, appears to have misused his power figuratively and sans adherence to the rules of procedure.

34. For the reasons aforerecorded, we allow this writ petition with the following directions.

(i) The order passed by Respondent No.6 dated 21st August, 2004, is hereby quashed and set aside. However, as the order dated 11th July, 2007 passed by Respondent No.6 is not a matter of challenge before us in the present writ petition, we leave the respective parties to take such steps as may be permissible to them in accordance with law.

(ii) The obvious result of setting aside the order dated 21st August, 2004 is that the extension granted to Respondent No.2 by Respondent No.6 is vitiated in law and cannot continue any

longer. Thus, we direct the State to invite fresh tenders within one month from the date of pronouncement of this order.

(iii) The Respondent-State shall appoint a Committee to determine the loss caused to the State exchequer, as a result of waiver of condition No. 5 of the original contract, as well as from the order granting extension for a period of three years to Respondent No.2.

However, in view of the above order, we further direct that the computation of loss shall be determined by the Committee for the period from 17th February, 2005 (when the contract period was to expire) till date of passing of this order.

(iv) Founded on the principles of public accountability and public interest, we direct that if any financial loss is determined by the Committee in terms of Clause (iii) above for the extended period, the same shall be recovered from Respondent No.2 who had taken benefit and advantage of the arbitrary order passed by Respondent No.6. The recovery shall be made in terms of the prescribed procedure and in accordance with law.

(v) The loss, if any, suffered by the State on account of unauthorised deletion of condition No. 5 of the original contract, as determined

by the Committee, shall be recovered from Respondent No.6 with effect from the date of deletion till the date of its restoration, in accordance with law.

(vi) In view of the established canons of public administration and decisions of Courts, clearly defining the field of judicial intervention in such matters and with an intention that a greater public purpose and interest is served and to avoid such arbitrary re-occurrence in the matters of State contracts, we consider it proper to issue direction to the State to ensure that no such extension of contracts is granted by its various Departments and instrumentalities in future. However, where it is found necessary in the wisdom of the Competent Authorities to grant such extension, it shall be extended for valid reasons alone, that too to be recorded in writing and after due consultation with concerned Department as also in accordance with Rules of Business, instructions issued by the Government, and in strict adherence to the prescribed procedure.

30. Rule is made absolute in the above terms, while leaving the parties to bear their own costs.

CHIEF JUSTICE

SMT. RANJANA DESAI, J.